

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re J.S., a Person Coming Under the Juvenile
Court Law.

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

J.L.,

Defendant and Appellant.

F073271

(Super. Ct. No. JJV068112A)

OPINION

APPEAL from an order of the Superior Court of Tulare County. Hugo J. Loza,
Judge.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Carol E. Holding,
Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Appellant J.L. (Mother)¹ appeals from the juvenile court's February 2, 2016, order terminating parental rights to her 11-year-old daughter, J.S. (the Minor), with a permanent plan of adoption. (Welf. & Inst. Code,² § 366.26.) At the core of Mother's claims on appeal is her contention that the court erred at the 12-month review hearing on September 24, 2015—at which time Mother's other reunification services were terminated due to her undisputed lack of participation—by improperly delegating to the Minor and the Minor's therapist the determination of whether postreunification visitation would occur.

In making its visitation order, the juvenile court did not adopt the proposed recommendation to reduce supervised visits to once per month due to Mother's failure to visit regularly. Instead, the court continued weekly supervised visits, provided the Minor would not be forced to attend visits, and authorized therapeutic visitation, but only if and when the Minor's therapist deemed such visitation appropriate. The Minor opted not to visit Mother and her therapist recommended against requiring the Minor to attend conjoint therapy with Mother during the brief time period between the 12-month review hearing and the section 366.26 hearing.

Now Mother claims her counsel was ineffective in failing to object to the postreunification visitation order at the 12-month review hearing and in failing thereafter to seek relief from the order by filing a petition for extraordinary writ or a section 388 petition. Mother argues she was prejudiced by the allegedly improper delegation of the juvenile court's visitation authority and that her due process rights were violated because

¹ In this opinion, certain persons are identified by abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

² All statutory references are to the Welfare and Institutions Code unless otherwise specified.

it denied her the opportunity, through therapeutic visitation, to bring herself within the “parental benefit” exception (§ 366.26, subd. (c)(1)(B)(i)) to the statutory preference for adoption. Mother concludes that “the order terminating parental rights must be reversed, either with direction the juvenile court order a guardianship or that it provide Mother at least six more months of reunification services which include meaningful therapeutic, conjoint visitation.”

We reject Mother’s arguments and conclude that she forfeited her claims challenging the postreunification visitation order by failing to file a petition for extraordinary writ after the 12-month review hearing. We further conclude that, even if Mother’s claims were not forfeited, any error was harmless because the record demonstrates beyond a reasonable doubt Mother would not have been able to bring herself within the parental benefit exception even if the Minor had been required to attend therapeutic visitation with Mother. Therefore, we will affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Section 300 Petition and Detention

On July 11, 2014, when the Minor was nine years old, a social worker with respondent Tulare County Health and Human Services Agency (the Agency) received an immediate referral regarding allegations of general neglect. In response to the referral, the social worker went to assist a police officer who advised her that Mother and the Minor’s maternal great aunt (the Aunt) had been arguing because Mother wanted to take the Minor with her. The officer told the social worker he was required to detain Mother in his patrol car until after he could investigate the Minor’s welfare because Mother could not cooperate with his request to calm down and was causing a disturbance.

The same day the social worker interviewed the Minor at the Aunt’s house. During the interview, the Minor exhibited signs of being under emotional distress, including bursting into tears, shaking, and constantly checking to see if Mother was

coming to her room to take her. The Minor told the social worker she was scared to leave with Mother because Mother became violent when she was angry. The Minor disclosed that Mother had threatened to kill her dogs and burn her “Nan’s house” if she did not leave with her.

The Minor further disclosed that Mother had previously threatened to hit her and that she was afraid of Mother’s boyfriend because she had witnessed him hurt dogs by kicking and yelling at them. She had also seen him punch Mother and make her bleed. The Minor further reported that Mother and the boyfriend would get drunk and start arguing in front of her, and that Mother did not have a place for them to live and she did not want to go to the house where the boyfriend lived. Mother also used marijuana and the Minor was scared Mother would die because she had lung problems.

On July 24, 2014, the social worker again met with the Minor at the Aunt’s house. The Minor again exhibited signs of distress, began to cry, and repeated she did not want to go with Mother. The Minor told the social worker Mother was going to be mad at her, and that Mother drank alcohol and smoked marijuana that could be smelled in the house.

On August 1, 2014, the social worker and a supervisor met with the Minor, who again exhibited signs of emotional distress and reported she did not feel safe with Mother and was afraid of Mother’s boyfriend. According to the Minor, Mother would forget about her when she was drinking and using marijuana and she would become violent when she was angry. The Minor recalled an incident where Mother got into a physical altercation with another female, who had to be picked up by an ambulance due to the severity of the injuries Mother inflicted on her.

On August 4, 2014, the social worker contacted Mother’s adult son. The son told the social worker he had resided with his maternal grandparents his whole life because Mother was on drugs and smoked marijuana and methamphetamine. He chose not to be around Mother and did not care to have a constant relationship with her.

On August 6, 2014, a “Team Decision Making Meeting” was held by the Agency. Before the meeting, Mother became argumentative and had difficulty controlling her emotions. She appeared agitated and fidgeted in her seat. She was very defensive and often interrupted others who were speaking. Mother’s boyfriend, who was also present at the meeting, repeatedly attempted to calm her down. Mother could not be calmed and had to leave the room, at which point she began making threats to flee with the Minor, stating, “I’m going to take her after this meeting; I’m going to take her.”

During the Team Decision Making Meeting, the maternal grandfather described how the grandparents had obtained a legal guardianship and raised Mother’s adult son from the time he was six years old due to Mother’s history of drug use and having an unsafe home environment. The grandfather reported that the son continued to suffer from emotional distress he had endured while living in Mother’s home, and described Mother as treating the son as property and being very possessive when the son was a child. Mother refused to validate any of the grandfather’s statements and was disrespectful towards him during the meeting. As a result of the meeting, the Agency decided to file a dependency petition, as there were “too many concerns” to return the Minor to Mother’s care at that time.

When Mother requested to see the Minor for a short time after the meeting, the Minor refused to see Mother without Agency staff present. The Agency clinician who was present during the meeting between the Minor and Mother reported that the Minor did not display any affection towards Mother or engage in conversation with her.

On August 8, 2014, the Agency filed a dependency petition on the Minor’s behalf based on Mother’s long-standing problems with anger management, domestic violence, and substance abuse. The petition alleged that the Minor came within the juvenile court’s jurisdiction under the provisions of section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), (c) (serious emotional damage), and (g) (no provision for support). On August 11, 2014, the Agency filed a first amended dependency petition, indicating

that the Minor was detained on August 8, 2014, on which date she was formally placed into protective custody with the Aunt.

In the August 12, 2014, detention report, the Agency reported that, although Mother and her boyfriend denied being in an ongoing domestic violence relationship, there was social media evidence confirming they engaged in such a relationship. The Agency further reported that Mother's inability to control her anger had led to her kicking a fish tank and severing several tendons in her leg. The detention report further noted that the Minor was visibly shaken whenever she would speak about going to live with Mother. The Agency concluded that Mother's ongoing domestic violence relationship with her boyfriend and her uncontrollable anger and outbursts placed the Minor at risk for harm. Moreover, the boyfriend was "facing criminal charges which would be his third strike and could lead to long term incarceration." This circumstance combined with Mother's statements she was planning to leave the jurisdiction of the court and not disclosing where she planned to take the child, placed the child at risk as Mother was likely to flee with her.

At the August 12, 2014, detention hearing, the juvenile court detained the Minor and granted Mother one-hour supervised visits twice a week.

Jurisdiction and Disposition

In the jurisdiction/disposition report filed on August 29, 2014, the Agency reported that Mother's initial visit with the Minor on August 21, 2014, was "very productive and beneficial to the child." The Minor was happy to see Mother and rushed into the visiting room to hug her, and they both expressed how much they had missed each other. Mother and the Minor played a game together on Mother's phone, and Mother asked the Minor about school. Overall, Mother and the Minor were observed to interact and engage well with one another.

While Mother was visiting with the Minor on August 21, 2014, the social worker interviewed the Aunt, who explained the Minor had lived in her home since she was

almost a year old and she had practically raised the Minor as her own child. Mother had never had the child in her care longer than a month. The Aunt explained that the situation had always been the same: Mother would insist on the Minor staying with the Aunt and the Aunt's husband because Mother did not want to raise the Minor, but whenever Mother got upset, she would come and take the Minor and threaten to never let the Aunt and her husband see her again. The Aunt told the social worker that Mother had serious drinking, drug, and anger management problems and that she had tried to get help for Mother, but Mother would not listen to her.

On October 21, 2014, the juvenile court assumed dependency jurisdiction over the Minor under section 300, subdivisions (a), (b), and (c), but dismissed the subdivision (g) count. The court continued the existing visitation schedule for Mother, granting the Agency discretion to increase the length and frequency of the visits, lift supervision, and allow overnight visitation, after consultation with the Minor's counsel.

Six-month Review

In the six-month review report filed on March 27, 2015, the Agency reported that Mother "routinely visited" the Minor and characterized the visits as "appropriate." Mother engaged the Minor "by reading, assisting with homework assignments, [and] painting nails." Mother also asked the Minor how she was doing in school and in her placement, and they spoke together about family and friends. However, because the Minor indicated she was content with the current visitation, the length of the visits had not been increased nor supervision lifted.

At the six-month review hearing on April 7, 2015, the juvenile court granted the request by the Minor's counsel that the supervised visits be once a week for two hours, instead of twice a week for one hour, and again gave the Agency the discretion to increase the length and frequency of visits, lift supervision, and allow overnight visits.

12-month Review

In the 12-month review report filed on September 14, 2015, the Agency recommended that the juvenile court reduce visitation to one two-hour visit per month on the ground that Mother had not regularly visited the Minor during the current review period. The Agency reported that, of the 22 ordered visits, Mother attended 13 and missed six, and three (scheduled for June 9, July 14, and August 25, 2015) were cancelled because the Minor did not want to visit Mother. When the social worker asked the Minor why she did not want to visit Mother, the Minor said: “My Mother is not doing enough to get me back.”

The Minor made a similar statement again on September 1, 2015, when the social worker met with the Minor and tried to encourage her to visit with Mother. The same day the social worker met with Mother and told her the Minor had stated she did not want to visit. Mother responded: “That’s it, they know I know what is right. After this hearing, I will move to Washington.” The social worker then told Mother she was doing her best to encourage the child to visit. Mother replied: “I know ..., but I am done.”

The 12-month review report noted that, during the visits that did take place, Mother continued to be “appropriate” and engaged the child in similar activities as those described in the six-month review report. Mother also showed the Minor pictures of her friends and relatives. They talked about shoes and clothing, and the Minor talked to Mother about school and her new dog. Mother brought stuffed animals for the Minor and read storybooks and played with her.

At the 12-month review hearing on September 24, 2015, Mother did not contest the Agency’s recommendation to terminate reunification services and set the matter for a section 366.26 hearing. The issue of visitation, however, was discussed at length by the parties. To provide context for the issues Mother raises on appeal, we now set forth this discussion in considerable detail:

“[MOTHER’S COUNSEL]: I’ve spoken to mother and I know that she hasn’t—per the report, she hasn’t done a lot. She’s had some issues because she feels like that [the Minor] doesn’t want to visit with her so why should she—

“THE COURT: Seems like that’s her primary concern or issue.

“[MOTHER’S COUNSEL]: So they’re going in a circle because [the Minor] is saying, ‘I don’t feel like—you’re not doing enough for me.’ [The Minor] is ten years old. I don’t think that [the Minor] should be in charge of the visits. I think that maybe we can order some sort of therapeutic visitation.

“Mother’s advised me that she’s going to engage in the services on her own to show this Court that she is able to do that, but she doesn’t want the visits to be reduced because—and I think the recommendation is reduction based on the fact that [the Minor] doesn’t want to visit, but again, it’s this circle that we’re having. I would like the visits to stay the same. Mom to be able to show [the Minor] that she’s willing to do what she needs to do.

“THE COURT: Because it sounds like a vicious circle.

“[MOTHER’S COUNSEL]: Right. I know we’re kind of stuck, but I think that the best thing would be if mom could see that [the Minor] is not really in control, at ten years old, of the visitation, and if [the Minor] could see that mom is making an effort then maybe we can reunify this family.

[¶] ... [¶]

“THE COURT: I think the perception from reading the report is that the mom is not doing what she’s supposed to do and [the Minor is] upset because [¶] ... [¶] She doesn’t feel like she’s fighting or working towards reunification, and so her way of expressing that is not to want to visit.

“[MINOR’S COUNSEL]: Correct. As analytical as she [is] at ten, this is not going to get better.

“THE COURT: All right. So what do you recommend?

“[MOTHER’S COUNSEL]: Your Honor, just quickly, I think [the Minor] is actually in counseling.

“THE COURT: Well, let me ask. Ma’am, the aunt, I’m assuming that [the Minor] talks to you, and what are [the Minor’s] feelings regarding visiting with mom? She doesn’t want to visit right now?

“THE AUNT: She doesn’t want to. I was having to talk her into it every time, and so the counselor and the caseworker told me I’ve done more harm than good by having [the Minor] go when she didn’t want to.

“THE COURT: And times that’s the case—

“THE AUNT: I don’t know, but they said I was causing more harm to [the Minor] than good by doing that so I quit, and when I quit talking to [the Minor] like that she said, ‘I’m not going. She hasn’t thought enough of me to fight for me,’ and half the time [Mother] couldn’t come see her. [The Minor] said, ‘I’m not going.’ [¶] ... [¶]

“[AGENCY’S COUNSEL]: Your Honor, I submit on the social worker’s report, and I would point out that we’re at the 12-month review and if the Court looks on page nine, the Court can see that [the Minor] has been regularly involved in counseling and she’s receiving her services. She’s doing her part, but if the Court ... goes on to the next page. ‘Mom. The mother has not engaged in her therapeutic services due to her issues.’

“So you have a ten year old doing what she should be doing, going to therapy and addressing her issues, and you have the mother, her mother, the child’s mother not doing her therapy at all, and so mother hasn’t addressed her issues and as pointed out, sometimes it’s not just that the child doesn’t want to see the mother, you have—

“THE COURT: It seems that [the Minor] has a basis for making that—you know. I think the problem that I see here is that the mom needs to be the one that’s the adult and says, ‘Well, my child doesn’t want to visit me. I’m not going to do the services.’ That’s not a logical or reasonable decision because my view would have been if you do as much as you can and you show the child that you’re fighting and working hard and that you’re doing everything you can to have that child returned to you, and instead you took the opposite course and I see that as a significant problem too.

“I don’t know how we rectify this in terms of getting [the Minor] to soften up and—there’s still going to be a relationship here, I’m assuming. I don’t know what the outcome is going to be, whatever it’s a guardianship or adoption or whatever, but they’re still family.

“[AGENCY’S COUNSEL]: And we have a couple of things going on there. We have, one, mother repeatedly stating, ‘I’m moving to Washington state.’

“THE COURT: Are you still thinking about going to Washington?

“THE MOTHER: As soon as this is all over, yes, sir.

“[MOTHER’S COUNSEL]: Just on my client’s behalf, she had spoken to me and advised me that she felt like she got some misinformation ... that she was told that if [the Minor] didn’t want to visit with her, [the Minor] didn’t have to visit with her. She kind of felt hopeless like she had no hope and that’s why she wanted to just not do her services. And she did try to do counseling with [the Minor] and she was told that she couldn’t join in on that counseling. I don’t believe there was an order for that.

“[AGENCY’S COUNSEL]: Well, it’s not just that, Your Honor, you have the mother missing the point here. The mother wasn’t doing her own therapy so how could she join [the Minor] in her therapy when mother hasn’t addressed her own issues?

“THE COURT: What’s the social worker recommending regarding visits?

“[AGENCY’S COUNSEL]: Reduction as noted in that the child not be forced. [¶] ... [¶]

“THE COURT: I still think we need to have the therapist—I don’t know what—I mean the goal should be that, all right, maybe the mom made a mistake in the way she handled things. I think what [the Minor] is wanting to see is the mom is ready, willing and able to do something to kind of soften things up, but I don’t know how that process gets going so that [the Minor] can see that, all right, the mom made a mistake. She admitted she made a mistake. She wants to work to do something. She still wants to visit. She still wants to have some sort of part. I don’t know how that—how that’s conveyed to [the Minor] in a therapeutic setting and whether [the Minor] is willing to deal with that as well. I don’t think reducing visits is going to help. I’d rather leave it open as far as her not being forced. She may come around. She is ten. If mom starts doing her thing, she may come around so I’d rather leave it open. [¶] ... [¶]

“[MOTHER’S COUNSEL]: Mom could do letters and things like that, but I would like to leave it open because this is also—I think the

long term plan is guardianship with the aunt who is a family member. If mom can do what she needs to do and get it together—

“THE COURT: If she moves to Washington—

“THE MOTHER: No. Only after this is done and over.

“THE COURT: What do you mean by ‘after?’ [¶] ... [¶]

“THE MOTHER: ...I’m not leaving my daughter. That’s only after everything is finished.

“[AGENCY’S COUNSEL]: Well, Your Honor, what does that mean? Because in four months we’re going to have a .26. [¶] ... [¶]

“[MOTHER’S COUNSEL]: I think what mom is saying, she would like to have a relationship with the child. She understands that right now maybe it’s in the child’s best interest to be with the guardian while she works on herself, but she’s not just never going to have a relationship. [¶] ... [¶]

“[AGENCY’S COUNSEL]: Your Honor, there is a therapist report. I didn’t know if the Court was aware of that. It’s attached to the privileged documents and it’s for the child, and it does point out that her diagnosis is Post Traumatic Stress Disorder, so forcing this child to visit is not in her best interest.

“As noted in comments made in court today, the therapist is the professional here saying that a ten year old shouldn’t be forced to visit the mother with this diagnosis.

“[MOTHER’S COUNSEL]: I’m not asking the Court to force the visits.

“THE COURT: Hold on a second. I think that one of the purposes of therapy would be to somehow convey to her that—but I think [the Minor] still has to see that mom is interested, but convey to her that the mom may have made a mistake in the way she handled this thing, but we need to work towards a situation where there’s a relationship of some kind. I don’t know. I think what we can do is realistically we can make an order.

“What’s the recommendation right now of how frequently?

“[AGENCY’S COUNSEL]: It’s my understanding right now is that it’s one time a week for two hours, that was the previous order.

“THE COURT: We can leave it at that. Set it at that, but obviously not force the child to visit, but I think somehow or another the therapist needs to be advised that even though we may not be working towards reunification necessarily, there’s still going to be a family relationship, and I mean—I don’t know what [the Minor] wants to be able to see from her end to soften her up so that she still wants to have a relationship with her mom. I don’t know what that would be. I think [the Minor] wants to see something. Whatever that is, I don’t know. But I think the order, given the fact that there haven’t been visits, that [the Minor] is not interested in visiting, that there seems to be a basis for her to reach that conclusion.

“I think we’ll order that the visits be reduced to one time per week of two hours but the child not be forced, but the therapist should make an effort to create a situation where that relationship can be reestablished somehow. To me that should be the goal somehow.

“[MINOR’S COUNSEL]: So is that saying that mother—once the therapist deems it appropriate, mother could also engage in therapeutic visitation?

“THE COURT: Absolutely. If the therapist is able to determine that therapeutic conjoint sessions can take place then obviously that should happen because that’s where it’s going to work out where the two of them are sitting together and [the Minor] can tell mom, ‘Look, you messed up, mom. You didn’t do this. You didn’t do that. This is why I’m so angry with you. I need to have you do X, Y, and Z.’

“And then the mom says, ‘I’m sorry. I messed up. I didn’t handle this thing correctly. I will try to be a better person, better parent.’ Whatever it’s going to take, and hopefully that gets it to the point where they have a better relationship, but I think that should be the goal to get to that point.”

Section 366.26 Hearing

In the section 366.26 report filed on December 31, 2015, the Agency recommended that the juvenile court terminate Mother’s parental rights so that the Minor’s adoption by the Aunt might proceed. The Agency noted that the Aunt had raised the child most of her life and was familiar with her background and individual needs. The Minor had a “strong bond” with the Aunt and the Aunt had a “very strong

relationship” with the Minor, and the Minor looked to the Aunt to fulfill her needs and felt safe and protected in her care.

The section 366.26 report reflected that the Minor was receiving individual therapy once a week, and the Minor also had joint family therapy with the Aunt. When the social worker spoke with the child’s therapist by phone, the therapist reported that the Minor was participating in her services and sharing her feelings. The Minor continued to have a lot of hurt and resentment towards Mother, which was being worked on in therapy. At the same time, the Minor did not appear to be ready for joint sessions with Mother. The therapist explained the therapy was family oriented and would focus on the area the child wanted to focus on, and they would not force the child to have joint therapy sessions with Mother.

The section 366.26 report further reflected that the Minor had not had any visits with Mother since before the 12-month review hearing. Although Mother had made contact with the Agency regarding visits with the Minor, when the social worker spoke with the Minor in person on October 21, 2015, the Minor shared she did not wish to have visits with Mother. When the social worker spoke with the Minor again on the phone on November 30, 2015, the Minor said she did not want to have visits with Mother and told the social worker, “I just don’t want to see her.” On December 15, 2015, the Minor again stated she did not want to have contact with Mother.

At the section 366.26 hearing held on February, 2, 2016, Mother testified that prior to the 12-month review hearing in September 2014, she had visits with the Minor and characterized the visits as “great.” Mother described the activities they engaged in, and testified that she and the Minor had “tried to, you know, rebuild the relationship that was broken” and “[i]t was going good.”

The last time Mother saw the Minor was in September 2015, and Mother testified she was not “really sure” why the visits stopped. The only contact she had with the Minor after September 2015 was through two phone calls the Minor made to her. The

first time the Minor called was on Thanksgiving, after the Minor had heard Mother had been in a car accident and called to make sure Mother was okay.

The second time the Minor called Mother was just the previous week. Mother testified that the Minor got upset with her and she did not think the Minor understood the difference between adoption and guardianship. According to Mother, the Minor stated that the social worker had told her to let the Aunt adopt her and that, later, when everything got better, the Minor could go back home with Mother. When Mother tried to explain it did not work that way and that adoption was final, the Minor got upset, accused Mother of lying, and asked why the social worker would lie to her.

Mother further testified she had made efforts for three months to try to see the Minor by contacting the social workers and supervisors and leaving messages, but she could not get a response from anybody. After three months of trying, she finally contacted her attorney and advised her that no one would call her back, she did not know what was going on, and she was supposed to be in therapy sessions.

The Aunt testified she was present the entire time during a recent phone call between the Minor and Mother and could hear everything the Minor said and never heard the Minor express any confusion over the permanency of adoption. The Aunt further testified that, during the conversation, the Minor told Mother “everything she had ever done wrong to her.” The Aunt had not known the Minor planned to do this when she called Mother, and testified it was as though the Minor “had all of her anger built up in her and she had to get it out, so she told her mom a lot of stuff.”

After the testimony concluded, Mother’s counsel argued that Mother’s testimony showed that she “occupies a parental role in the child’s life, that she has throughout this child’s life” and because there was “such a bond” between them, the Mother was agreeable to a legal guardianship but would ask the court not to order adoption at that time. Mother’s counsel argued that a guardianship would be in the Minor’s best interests

and that “once [Mother] gets things settled and together, she could always come back and try to do what she needs to get [the Minor] back.”

The Agency’s counsel asked the juvenile court to terminate parental rights and find adoption was the preferred plan, pointing out that the Minor was living with relatives who had taken good care of her and wanted to adopt her. Counsel noted that the burden for applying the parental benefit exception to adoption was very high, and that Mother needed to show she had consistently and regularly visited the Minor and that the benefits of the parent-child bond exceeded the benefits to the Minor of adoption in a stable home. The Minor currently was in a stable home and adoption would give her the opportunity to have a permanent and stable home.

The Agency’s counsel further argued that the position of Mother’s counsel that, with a guardianship, Mother could always come back and get the child was “destabilizing.” The Agency’s counsel noted that Mother had already been offered 12 months of reunification services but even as late as the 12-month review hearing had not participated in any of those services. Mother had not made substantial progress in her case plan or consistently visited with the Minor. Moreover, the Minor was adamant in her feelings about her relationship with Mother and did not want to return home or continue visiting with Mother.

The Minor’s counsel also argued in favor of terminating parental rights and selecting a permanent plan of adoption. The Minor’s counsel recalled how at the 12-month review hearing he had argued in favor of leaving the visits open and had been supportive of the Minor visiting Mother, but it had not worked. He had since spoken with the Minor about permanent adoption and defined it to her, and the Minor understood and did not have any questions or concerns. He also had met with the caregivers several times and he thought permanency was exactly what the Minor needed.

Mother’s counsel then addressed the juvenile court with additional comments on the subject of visitation, arguing that the comments of the therapist noted in the

section 366.26 report showed, “in essence, the Mother was denied any visitation with the child because the therapist decided they weren’t going to force the child to have [joint] therapy sessions [with Mother].” Counsel further argued: “Now we’re saying because the child didn’t want to have therapy visitation with the Mother, ... you know we’re going to terminate [parental rights], so ... my client doesn’t feel that’s fair that she’s being punished for the child not wanting to have the visits because she did make every effort to continue with the visits.”

After listening to the arguments of counsel, the juvenile court adopted the Agency’s recommendation and ordered termination of parental rights with a permanent plan of adoption. In ruling, the court found the parental benefit exception inapplicable, explaining:

“[The exception] that is being presented to the Court, is that the parent and the child have had regular visitation and contact with the child and also that the child would benefit from a continuing relationship. And I think it is true that they have not had regular visits. [¶] Now, the question is whether it appears that, at least from the reports that I’ve read, is that the child has refused to visit with the mom for—obviously she has anger or feelings about the relationship she has with her mom. It’s clear that there is some sort of animosity or anger that the child has towards the mom for reasons that the child has presented, both in therapy and at various times, for wanting to have no contact with her mom. She’s had no visits with the mom since September 15th, except for maybe two phone calls. And so she’s refused to maintain regular contact with her mom. And I think that, you know, the circumstantial evidence indicates at the very least, if not direct evidence, there’s at least circumstantial evidence, that there really is no parent/child relationship, and there is really no evidence to support the argument that the child would benefit from continuing that relationship based upon her refusal to see her mom and visit with her mom. I just don’t think that there’s a—there would be any detriment to the child if the parental relationship is terminated.”

DISCUSSION

As mentioned above, Mother’s claims on appeal are based on her contention that the juvenile court erred at the 12-month review hearing by delegating to the Minor and

the Minor's therapist the determination of whether or not postreunification visitation would occur.

Waiver/Forfeiture

We agree with the Agency that Mother has waived and/or forfeited her right to review of her claims challenging the propriety of the postreunification visitation order by failing to file a petition for extraordinary writ after the 12-month review hearing. The visitation order was included in the order setting a section 366.26 hearing. Such an order “is not appealable; direct appellate consideration of the propriety of the setting order may be had only by petition for extraordinary writ review of the order. [Citations.] An aggrieved party may seek review of the setting order by appeal from the order subsequently made at the section 366.26 hearing, but only if: (1) the party filed a timely petition for extraordinary writ review of the setting order; (2) the petition substantively addressed the specific issues to be challenged and supported the challenge by an adequate record; and (3) the appellate court summarily denied or otherwise did not decide the petition on the merits.” (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 719–720, fn. omitted; § 366.26, subd. (l)(1) & (2).)

The waiver rule also applies to claims of ineffective assistance of counsel. “[I]f a parent, for whatever reason, has failed to timely and appropriately raise a claim about the existence or quality of counsel received at a proceeding antedating the [section 366.26] hearing, we will apply the waiver rule to foreclose the parent from raising such an objection on appeal from the termination order.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1160 (*Meranda P.*)). And although Mother claims that the court's order denied her due process, raising “‘issues ... involv[ing] important constitutional and statutory rights’” alone does not justify relaxing the waiver rule. (*In re Janee J.* (1999) 74 Cal.App.4th 198, 206, 208; *In re A.C.* (2008) 166 Cal.App.4th 146, 156 [whether parent “alleges that the dependency court violated his due process rights” is “not the test under *Meranda P.*”].)

Harmless Error

Even were we to assume that Mother had not forfeited her right to challenge the postreunification visitation order and that the juvenile court erroneously delegated to the Minor and the Minor's therapist the court's authority to determine visitation, we are convinced any such error was harmless under the "harmless beyond a reasonable doubt" standard articulated in *Chapman v. California* (1967) 386 U.S. 18, which Mother asserts is applicable to her due process claim.³ This is so because the record establishes overwhelmingly that no difference in the outcome would have occurred if the court's order had required the Minor to attend therapeutic visitation during the brief period of time between the 12-month review hearing on September 24, 2015, and the section 366.26 hearing on February 2, 2016.⁴

Mother's prejudice argument assumes the juvenile court's failure to require the Minor to attend therapeutic visitation precluded Mother from being able to establish the parental benefit exception to adoption. However, this exception applies only if termination would be detrimental to the Minor because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing

³ In light of our conclusion that the asserted error was harmless under this heightened standard, we necessarily conclude it was harmless under the less stringent standard applicable to Mother's ineffective assistance of counsel claim. To prevail on either a constitutional or statutory claim of ineffective assistance of counsel, the claimant must show, in addition to deficient performance by counsel, a reasonable probability that an outcome more favorable to the claimant would have resulted in the absence of counsel's alleged errors. (*Meranda P.*, *supra*, 56 Cal.App.4th at p. 1153.) Since the failure of either prong is fatal to establishing ineffective assistance of counsel, we need not address both prongs if we conclude Mother cannot prevail on one of them. (*People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

⁴ Although we will assume for argument's sake that Mother was entitled to the therapeutic visitation she claims would have allowed her to establish a beneficial parent-child relationship, we note that Mother has cited no authority that she was entitled to therapeutic visitation at the time of the 12-month review hearing. Section 366.21, subdivision (h), the pertinent statutory provision, simply provides that the juvenile court "shall continue to permit the parent ... to visit the child pending the [section 366.26] hearing unless it finds that visitation would be detrimental to the child."

the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Had Mother maintained regular visitation and contact with the Minor prior to the 12-month review hearing, her argument might be more compelling. As it stands, however, Mother missed six visits between the time of the six-month review hearing and the 12-month review hearing, in addition to the three visits that were canceled because of the Minor’s desire not to visit Mother due to Mother’s undisputed failure to participate in reunification services. Thus, contrary to the assertion of Mother’s counsel at the 12-month review hearing, the Agency’s recommendation to reduce visits at that time was not based on the fact that the Minor did not want to visit Mother. Rather, as stated in the 12-month review report, the recommended reduction was based on Mother’s failure to visit regularly.

The record provides no basis to conclude that Mother would suddenly change her past pattern of nonparticipation and attend therapeutic visitation on a regular basis even if the Minor was required to attend such visitation. Indeed, such an outcome was highly unlikely given Mother’s failure to participate in her own individual therapy, which had been included in her reunification services, as well as her failure to follow through on her intentions, as reported by her counsel at the 12-month review hearing, to engage in services on her own, after reunification services were terminated.

To the extent Mother claims that she was discouraged from attending supervised visits prior to the 12-month review hearing by the Minor’s expressed desire not to visit Mother, it is unlikely that this excuse for missing visits would have been eliminated by requiring the Minor to attend therapeutic visits since the therapist would likely have encouraged the Minor to discuss with Mother the hurt and disappointment caused by Mother’s failure to attend past visits and to participate in reunification services, which was the reported basis of the Minor’s desire not to visit Mother. The record indicates Mother had difficulty tolerating situations in which she was confronted with negative opinions of herself and her behavior. In light of this and her failure to participate in her own services, including therapy, the record provides reasonable grounds for predicting

that Mother would be upset when confronted by the Minor's feelings in a therapeutic setting and resume her established pattern of nonparticipation in services, even if the Minor was ordered to attend therapeutic visitation against her will.

The record also belies the argument of Mother's counsel at the section 366.26 hearing that Mother made *every effort* to visit with the Minor after the 12-month review hearing. By Mother's own account at the section 366.26 hearing, she waited for *three months* before contacting her attorney to complain that no one at the Agency was responding to her messages about scheduling therapeutic visitation with the Minor. As there were only three full months separating the 12-month review hearing on September 24, 2015, and the section 366.26 hearing on February 2, 2016 (i.e., November, December, and January), Mother's testimony suggests she waited until the proverbial eve of the section 366.26 hearing to contact her attorney regarding the lack of visitation.

Furthermore, the parental benefit exception would have required Mother to show not only that she maintained regular visitation and contact with the Minor, but also that the Minor would *benefit* from continuing the relationship. In this regard, "[a] parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child.... The relationship arises from the day-to-day interaction, companionship and shared experiences.' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent.'" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207, fn. omitted.)

"The juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The parent does not shoulder his or her burden by showing that the child would receive some incidental benefit from a continued relationship with the parent. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Rather, the relationship

must promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new adoptive parents. (*Ibid.*)

As the Agency points out, there is no evidence that a beneficial parent-child relationship existed between Mother and the Minor *before* the 12-month review hearing such that there would be reason to believe that continuing visitation would have enabled Mother to establish the parental benefit exception to adoption. Instead, the record contains unrefuted evidence that, even before the dependency action was initiated, the Minor had lived most of her life with the Aunt, who had essentially raised the Minor as her own child, and the Minor was living with the Aunt at the time of the July 2014 incident precipitating the dependency action. There was also evidence that the Minor exhibited signs of emotional distress whenever speaking with Agency staff about the possibility of returning to Mother.

Moreover, after the Team Decision Making Meeting in early August 2014, when the Agency decided to file a dependency petition, the Minor expressed an unwillingness to visit with Mother without Agency staff present. Despite Mother's testimony at the section 366.26 hearing describing her early supervised visits with the Minor as "great" and reports that Mother engaged in appropriate behavior with the Minor during these visits, the record reflects that the Minor never deviated from her unwillingness to visit Mother without supervisory staff present. Based on the Minor's reported contentment with the current visitation schedule—which limited visitation to only two hours per week—the Agency did not seek to lift supervision or increase the amount of visitation during the six-month review period.

Mother's own testimony at the section 366.26 hearing acknowledged that her aim during the visits during this period was to try to "rebuild" a relationship with the Minor that Mother characterized as "broken." There is nothing in the record indicating Mother had the potential to transform the fragile and damaged relationship that existed between her and the Minor prior to the 12-month review hearing into the kind of beneficial parent-

child relationship required to bring Mother under the parental benefit exception by the time of the section 366.26 hearing. Indeed, “[t]he kind of parent-child bond the court may rely on to avoid termination of parental rights under the exception ... does not arise in the short period between the termination of services and the section 366.26 hearing.” (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1196.)

Finally, we note that the juvenile court’s comments at the 12-month review hearing indicate that the primary motivation behind its visitation order to continue weekly supervised visits but not forcing the Minor’s attendance, and to authorize the possibility of therapeutic visitation, was not to help Mother create a beneficial parent-child bond where none already existed. Rather, it was simply to leave open the potential opportunity for Mother to try to heal the hurt feelings the Minor had understandably suffered as a result of Mother’s failure to participate in her reunification services and the lack of interest it communicated to the Minor in recognition of the fact that the Minor’s prospective adoptive parent was a relative of Mother and there was likely to be some contact between Mother and the Minor in the future.

In light of all the circumstances presented, any error in regard to the lack of postreunification therapeutic visitation due to the allegedly improper delegation of the juvenile court’s visitation authority to the Minor and her therapist was harmless beyond a reasonable doubt.

DISPOSITION

The order terminating parental rights is affirmed.

HILL, P.J.

WE CONCUR:

GOMES, J.

SMITH, J.